LABOR LAW

The Present Constitutional Status of the Law of Picketing

Picketing has recently been considered in a new light by the United States Supreme Court, with the result that the law in this regard has been altered considerably. On February 10, 1941 the highest court of the nation handed down two decisions which changed the law of picketing to a great extent. In *Milk Wagon Drivers Union, Etc.* v. *Meadowmoor Dairies*,[1] the court, speaking through Mr. Justice Frankfurter enjoined a labor union and its members from peacefully picketing and influencing customers not to buy from the independently owned trade outlets of a dairy. The union was opposed to the system of distribution of milk used by the dairy because it did not require the employment of members of the union. The court said that the guarantee of free speech would be of no avail to the defendant union in regard to future peaceful picketing, because prior picketing, "was set in a background of violence . . ." and because the ". . . momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."[3] States can ". . . base protection against future coercion on an inference of the continuing threat of past misconduct."[4]

In the case of *American Federation of Labor* v. *Swing*[5] the Supreme Court, in another opinion by Mr. Justice Frankfurter, ruled that a state could not, through a common law ruling, require as a prerequisite to lawful picketing, the relation of employee-employer. This, the court said was an unwarranted interference with freedom of communication, which is guaranteed by the Constitution in the first and fourteenth amendments.

Since the rulings of both of these cases are ultimately based on Fed-

[1] 311 U.S.—, 61 Sup. Ct. 552, 85 L.Ed. 497, 7 L.R.R. 636 (1941).

furter, refused to set aside an injunction of the Illinois court[2] which

[2] Meadowmoor Dairies v. Milk Wagon Drivers Union Etc., 371 Ill. 377, 21 N.E. (2d) 308 (1939).

[3] 85 L.Ed. 500, 61 Sup. Ct. 555 (1941).

[4] Note 3, *supra*. The court cites but one case to substantiate its holding: *Cf. Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 60 Sup Ct. 618, 84 L.Ed. 852 (1940). In that case illegal control over gasoline jobbers had been maintained by the patentee of a tetraethyl lead fluid, by the use of a licensing system whereby refiners who were also licensed by the patentee, were prohibited from selling to unlicensed jobbers. The court said that this monopolistic practice could be suppressed by the state, and that the whole licensing device might be restrained even though there was a possibility that the system could be used for some lawful purposes. The reason given was that the state was bound to take such reasonable measures as would preclude the revival of the former illegal methods.

[5] 311 U.S.—, 61 Sup. Ct. 568, 85 L.Ed. 513, 7 L.R.R. 643 (1941).

eral constitutional questions, the state courts will necessarily have to follow these two decisions.[6]

The opinion in the *Swing* case is sufficiently convincing and broadly stated so that it is safe to draw the conclusion that if picketing is merely "peaceful persuasion" disentangled from violence and free from "picketing *en masse*" or otherwise conducted so as to occasion "minimum aggravated danger" it cannot be enjoined, regardless of what the common law rule or statute had been in the various states before this time.

The Ohio rule which would not legalize picketing unless directly connected with a trade dispute is found in *La France Electrical Construction and Supply Co.* v. *I.B.E.W.*[7] The court in that case held that a trade dispute existed when employees were striking for reemployment under conditions which were different from those exacted by the employer. This rule had been recently expanded somewhat by an opinion of the Court of Appeals of Fairfield County.[8] That tribunal held that picketing was permissible in order to compel a store to observe closing hours established by the Grocery Clerks' Union and observed by all other stores in the locality. The court said that such altercation constituted a valid trade dispute, even though the owners of the store were the sole workers in the business. These Ohio principles are not now of great importance, since it will no longer be necessary for the Ohio courts to follow them, in view of the United States Supreme Court's new attitude.[9] The *Meadowmoor* case takes away much of the liberal effect which the *Swing* case might have had in the future. Mr. Justice Frankfurter declares, ". . . the right of free speech in the future cannot be forfeited because of disconnected acts of past violence. Nor may a state enjoin peaceful picketing merely because it may provoke violence in others."[10] However, if the state court finds as a *fact* that the picketing was enmeshed with violence, and that because the violence cannot be disassociated from the picketing, the picketing still has a coercive effect, then the court can enjoin all future picketing. The state may protect its citizens and corporations from future coercion, and it may use as a basis of this coercion, the possibility that an inference will be drawn from the past misconduct, by persons formally coerced, that the violence will continue in the future.[11]

[6] United States v. Reynolds, 225 U.S. 133, 59 L.Ed. 162, 35 Sup. Ct. 86 (1914); Smith v. Panson, 1 Ohio 236, 13 Am. Dec. 608 (1821).

[7] 108 Ohio St. 61, 140 N.E. 899 (1923).

[8] Evans v. Retail Clerks Union, 66 Ohio App. 158, 32 N.E. (2d) 51 (1941).

[9] Note 6, *supra*.

[10] 85 L.Ed. 501, 61 Sup. Ct. 556 (1941).

[11] Note 1, *supra*.

It is interesting to note in this regard, however, that the Illinois Supreme Court did not justify the injunction solely on the ground of future coercion. In fact, a very small portion of that court's lengthy decision was devoted to a discussion of this point. Instead, the Illinois court used as reasons for sustaining the lower court's action the old idea of "No trade dispute," plus the thought that the right of free speech cannot be relied upon to the exclusion of the right to engage in business and to acquire and protect property—both rights having been declared inherent in the constitution.[12]

The United States Supreme Court refused to review the facts found by this Illinois court, and claimed that the duty of the former tribunal was merely to pass on the question of whether the state had the *power* to issue such an injunction. The findings of fact must be accepted by the United States Supreme Court since it will review the law on appeal.[13]

This conclusion, coupled with the holding of the court in regard to future coercion, would seem to indicate that if the court applied the doctrine of the *Meadowmoor* case narrowly, it would not be too serious a limitation on peaceful picketing. The inference could very well be that before the Supreme Court would sustain an injunction against peaceful picketing (guaranteed by the constitution under the *Swing* case) it would require a finding of fact by the state court that future peaceful picketing would have a coercive and intimidating effect because of former violence closely related to former picketing.

However, on February 10, 1941—the same day that the United States Supreme Court decided the *Meadowmoor* case—it denied *certiorari* in the Ohio case of *Crosby* v. *Rath*.[14] The Ohio Supreme had sustained a lower court injunction on the ground that there was no trade dispute as defined in the *La France Case*,[15] but the *Swing* case decided one day before, erased this requirement from the law. So it seems that the highest tribunal of the land should have allowed the appeal. In the findings of the various Ohio Courts that heard the case, facts of violence appear along with the picketing. There are no findings, however, that this violence would tend to be coercive in the future, nor is it shown that if peaceful picketing were allowed, the fear of violence would be prevalent. The logical conclusion is that any injunction against future peaceful picketing will be sustained if violence occured

[12] Note 2, *supra*.

[13] Note 10, *supra*.

[14] Rath v. Crosby, 61 S. Ct. 618, 85 L.Ed. 554 (1941); Crosby v. Rath, 136 Ohio St. 352, 25 N.E. (2d) 934 (1940). See note, *"Limitations on th eDefinition on a Trade Dispute."—Picketing as an Exercise of Free Speech*, 6 OHIO ST. L. J. 334.

[15] Note 7, *supra*.

before the injunction issued. So it seems that the United States Supreme Court does not narrowly interpret its decision in the *Meadowmoor* case.

While the standard of how much violence is necessary should be that set out in the *Meadowmoor* case—namely, was it coercive— the fact that the court refused to hear the *Crosby* case would seem to indicate that there is no standard at all. The mere finding of violence associated with the picketing is evidently enough to justify the issuance of an injunction to stop all further picketing.

Mr. Justice Frankfurter blandly told the defendant in the *Meadowmoor* case that it might ask the Illinois court to modify or vacate the injunction when the violence no longer had any intimidating effect.[16] This is some concession to the union in that case, but what about the union in the *Crosby* case? There had been no findings that future peaceful picketing would be coercive. Can the defendant go to court and demand that the injunction be vacated on the ground that there never was such a finding? This question is left unanswered by the decisions thus far. R. C. C.

PLEADING AND PROCEDURE

Appeal—Notice of Appeal—Sufficiency and Amendment of Notice

In an action in equity a decree was entered January 3, 1940. A motion for new trial, filed the same day, was overruled February 9, the entry fixing the amount of bond to be furnished by plaintiff-appellant upon appeal on questions of law and fact. Within twenty days thereafter plaintiff-appellant gave "notice of her intention to Appeal to the Court of Appeals from a final order made in the Court of Common Pleas in the above entitled cause on the 9th day of February, 1940. . . ." The Court of Appeals *on its own motion* dismissed the appeal because the notice of appeal was defective in that it specified the order overruling the motion for new trial, which is not a final order, instead of the prior appealable decree. An application for rehearing and a motion for leave to amend the notice were denied on the ground that the Court of Appeals has no authority to permit such amendment. This decision was reaffirmed on a second application for rehearing. From an entry dismissing the appeal and denying the application for rehearing and for leave to amend, a motion to certify was granted. *Held*, (By the Court) that, since the court of appeals has power to make

[16] 85 L.Ed. 566, 61 Sup. Ct. 510 (1941).